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IN THE

Supreme Court of the United States

October Term, 1955

No. 479

SHIRLINGTON SUPERMARKET, INC., AND ITS SUBSIDIARIES, SHIRLEY FOOD STORE NO. 1, INC., SHIRLEY FOOD STORE NO. 2, INC., SHIRLEY FOOD STORE NO. 5, INC., SHIRLEY FOOD STORE NO. 6, INC., AND WESTMONT SUPERMARKET, INC., RESPONDENT

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOSEPH F. CASTIELLO
637 Woodward Building
Washington 5, D. C.

NATHANIEL GOLDBERG
MARTIN J. KIRSCH
800 Woodward Building
Washington 5, D. C.
Counsel for Petitioner

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In The

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No. .....

Shirlington Supermarket, Inc., and Its Subsidiaries, Shirley Food Store No. 1, Inc., Shirley Food Store No. 2, Inc., Shirley Food Store No. 5, Inc., Shirley Food Store No. 6, Inc., and Westmont Supermarket, Inc.,

Petitioner,

v.

National Labor Relations Board,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Shirlington Supermarket, Inc., and its subsidiaries, Shirley Food Store No. 1, Inc., Shirley Food Store No. 2, Inc., Shirley Food Store No. 5, Inc., Shirley Food Store No. 6, Inc., and Westmont Supermarket, Inc., prays that a writ of certiorari issue to review the final Judgment of the Court of Appeals for the Fourth Circuit enforcing a decision and order of the National Labor Relations Board based upon proceedings had in violation of Petitioner's constitutional rights of free speech and in

violation of the provisions of the National Labor Relations Act, as amended, herein referred to as the Act.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Fourth Circuit is not yet reported. A copy of the Court's opinion and decree are appended.

The pertinent opinions of the National Labor Relations Board, herein called the Board, are as follows:

Supplemental Decision, Order and Second Direction of Election dated January 15, 1953, reported in 102 NLRB 312 (R. 11-13).*

Second Supplemental Decision and Certification of Representatives dated August 7, 1953, reported in 106 NLRB No. 109 (R. 32).

Decision and Order dated April 29, 1954, reported in 108 NLRB No. 90 (R. 45-56).

JURISDICTION

The judgment of the Court of Appeals was dated and entered July 25, 1955, *as was the dissenting opinion.* The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Board exceeded the constitutional limits of its power in setting aside an election based on a rule which *requires* an employer, who expresses his views

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* Reference is to the record in the Court below, nine (9) copies of which have been filed with the Court. (The Appendix to the Board's brief (petitioner below) is the only appendix below.)

on unionization to his employees on company time and property, prior to an election, in a lawful and non-coercive manner, *to grant* a labor union a substantially equal opportunity to reply under similar circumstances where the employer has no rule against solicitation, where the Union has openly campaigned and solicited on company time and company premises many times and on many days immediately prior to the election without interference from the employer, and had opportunities to present its views under other circumstances.

2. Whether the Board, in the exercise of its statutory power to control elections, has any power to specify the conditions under which the right of free speech may be exercised.

3. Whether the Board ignored Section 8(c) of the Act in assuming the power to fix the constitutional limits of the privilege of free speech in its conduct of elections, and, if so, whether such assumption is valid.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The First Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. Section 8(c) of the National Labor Relations Act as amended, 61 Stat. 151, et seq:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter if such expres-

sion contains no threat of reprisal or force or promise of benefit."

3. Section 9(c) 3 of the National Labor Relations Act, as amended (*supra*):

"No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve month period, a valid election shall have been held * * ."

STATEMENT OF THE CASE

This petition seeks review of a judgment of the Court of Appeals for the Fourth Circuit which enforced an order of the Board directing Petitioner to bargain with Local 1501, Retail Clerks International Association, herein called the Union, based on a Board finding that Petitioner had violated Sections 8(a) (5) and (1) of the Act on and after September 14, 1953. The Petitioner admitted the refusal to bargain challenging the validity of the certification of the Union in the underlying representation proceedings. No unfair practice other than the refusal to bargain is involved.

The Petitioner operates five retail stores in the state of Virginia, near Washington, D. C. On petition of the Union an election was scheduled to determine the wishes of the 66 eligible employees, all of whom worked in Petitioner's stores.

The pertinent facts with respect to the representation proceedings are as follows:

1. The First Election

The Union *lost* the first election held on September 6, 1952, by a vote of 24 to 36, and filed objections thereto. The Regional Director recommended that the election be set aside *solely* on the ground that the employer had made speeches to the eligible employees in its stores on

company time about 2½ hours before the election started, and that the "Timing of the speeches denied a substantially equal opportunity for presentation of the Union's views and was tantamount to a refusal to consider a request by the Union to reply". The Petitioner filed its exceptions (R. 9, 10) contending, *inter alia,* that the action of the Director was not authorized either by the Constitution or the Act. Furthermore, that the Union had actively campaigned in the stores for many days prior to the election during company time without the restrictions of a no-solicitation rule and without interference from Petitioner. The Board ordered the election set aside and directed a new one (R. 11-13), on the sole ground aforesaid.

2. The Second Election

The second election was held on February 7, 1953, within 7 months of the first election. The Union won, and Petitioner filed objections thereto, (R. 15, 16) *inter alia,* reiterating its contention that the Board exceeded its authority in setting aside the first election, and that the second election was held in disregard of Section 9(c) (3) of the Act which prohibits a second election in the same unit "within which, in the preceding twelve-month period, a valid election shall have been held", *supra.*

The Board overruled Petitioner's objections and certified the Union (R. 35).

3. The Board's Order

The Petitioner refused to bargain with the Union challenging its certification as a nullity (R. 45) continuing to contend that the *first* election, lost by the Union was *valid,* and that the Board was prohibited by the statute to direct the second election. (Section 9(c) (3) of the Act, *supra.*) *It is conceded that Section 9(c) (3) applies if the first election was valid.* (Board Brief, below, p. 9).

The Board issued its Complaint, and after stipulation (R. 35-45) of the entire record in the underlying representation proceeding, the Board issued its Decision and Order (R. 45-55).

4. The decision of the Court below.

In a 2-1 decision, a majority of the Court below enforced the order of the Board. The majority held that free speech was not involved and that the Board's action in setting aside the first election was within its discretion to insure a fair election despite the fact that the employer's speeches were privileged.

The *dissenting* opinion of Judge Soper (Pet. App. 25), a 16 page vigorous dissent, held that the Board had exceeded the Constitutional limits of its power by *"assuming a power to fix the Constitutional limits of the privilege of free speech," a power which the Act does not and could not confer to it.* (Pet. App. 38) (Emphasis supplied)

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below in this case is directly in conflict with the decisions of the Second Circuit Court of Appeals in Bonwit Teller, Inc., v. N.L.R.B., 197 F. 2d 640, and in N.L.R.B, v. American Tube Bending Co., 134 F. (2d) 993; and with the decision of the Sixth Circuit in N.L.R.B. v. F. W. Woolworth Co., 214 F. 2d 78.

The decision in this case was premised on a rule established by the Board in *Bonwit Teller, Inc.,* 96 N.L.R.B. 608. Its effect was that an election is invalid if an employer assembles his employees on company time and property prior to an election and speaks on unionism while denying the union, on request, a similar opportunity to address the employees. On appeal the Second Circuit sustained the Board's action *only* because the employer

enforced a no-solicitation rule, the discriminatory application of which was considered the unfair labor practice. That Court, in direct contrast to the court below, disapproved the equal opportunity test where a no-solicitation rule was not present, holding, "As we have indicated above, the violation here was the discriminatory application of the non-solicitation rule. If Bonwit Teller were to abandon that rule, we do not think it would then be required to accord the Union a similar opportunity to address the employees each time Rudolph made an anti-union speech. Nothing in the Act nor in reason compels such 'an eye for an eye, a tooth for a tooth' result so long as the avenues of communication are kept open to both sides." *Bonwit Teller, Inc.*, v. *N.L.R.B.* supra at 646.

In 1953 this issue again came before the Second Circuit in *N.L.R.B.* v. *American Tube Bending Co., Inc.*, 205 F. 2d 45, and the Court, enforcing again only because of a no-solicitation rule, reiterated that the Board's order could not stand on the equal opportunity test alone.

In the *Woolworth* case, *supra*, the Sixth Circuit, again in contrast to the Court below in this case, and going one step further than the Second Circuit, refused enforcement of a Board's order in similar circumstances where, however, the employer even had a no-solicitation rule. The Court stated the issue involved as: "The question squarely presented in this petition for enforcement is whether an employer which addresses its employees on the subject of unionization, on its premises and during working time in a lawful and uncoercive manner protected by Section 8(c) of the National Labor Relations Act, is required to admit union agents into its premises to address its employees for an equal amount of time during working hours, there being adequate facilities in the immediate area for contact between the union and employees." The *Woolworth* opinion reviews extensively the issue of free speech and the legislative intent "to insure both to

employers and labor organizations full freedom to express their views to employees on labor matters, so long as they refrain from threats of violence, intimation of economic refusal, or offers of benefit" (Senate Report No. 105 on Senate Bill No. 1126, dated April 17, 1947). And at p. 79, the Sixth Circuit held: "In view of the legislative history, while Section 8(c) is a restatement of the principle embodied in the First Amendment of the United States Constitution, its addition to the * * * Act is an authoritative direction given by the Congress to the Board to apply the First Amendment in behalf of the employer as well as the employee." * * * "To compel the employer, if he exercises his right of free speech, to accord * * * to union representatives a similar opportunity in working time, limits the application of the freedom of speech provision written in Section 8(c)." (p. 82). And at p. 83 the Sixth Circuit concludes: "Freedom of speech is guaranteed under the Constitution alike to the weak and the powerful. *The Board is not authorized by construction and implication to limit the freedom of speech established in the Constitution and re-emphasized in Section 8(c).*" (Emphasis supplied) And to the same effect is the concurring opinion in the same case: *"Neither the Constitution, the common law, nor the Labor Management Relations Act confers upon the employees the right to use for union purposes the property of their employer during working hours, over the objections of the employer."* (Emphasis supplied).

Judge Soper, in his dissent, having discussed the decisions in *Bonwit Teller* and *Woolworth*, supra, points up the conflict between the opinion below and those cases, observing, at p. 28, "It is manifest that *all of the judges in these two cases*, in both the majority and dissenting opinions, *would disapprove the action of the Board in the pending case*, since it is conceded that the company permitted the representatives of the union freely to enter

its stores at any time and solicit the votes of the employees." (Emphasis supplied)

2. The decision below is in direct conflict with a decision of the National Labor Relations Board, under the identical circumstances, decided prior to the Board's Order herein, and with a decision of the Court of Appeals for the Eighth Circuit.

As the dissenting opinion confirms, (at p. 28), "• • • the Board itself *prior* to its decision in the pending case, condemned and repudiated its own *Bonwit-Teller* rule • • •", *supra*, which was the basis for setting aside the first election and subsequently issuing the order to bargain." *Livingston Shirt Corporation*, 107 NLRB 109; *Peerless Plywood*, 107 NLRB 106. Judge Soper quotes (pp. 29, 30) from the Board's own decision in *Livingston, supra*, as follows:

> "• • • *If the privilege of free speech is to be given real meaning, it cannot be qualified by grafting upon it conditions which are tantamount to negation.*
>
> 'It is conceded by everyone that Congress intended that both employers and unions should be free to attempt by speech or otherwise to influence and persuade employees in their ultimate choice, so long as the persuasion is not violative of the express provisions of the Act; and *we find nothing in the statute which even hints at any congressional intent to restrict an employer in the use of his own premises for the purpose of airing his views.* On the contrary, an employer's premises are the natural forum for him just as the union hall is the inviolable forum for the union to assemble and address employees. • • • there remains open to them all the customary means for communicating with employees. These include individual contact with employees on the employer's premises outside working hours (absent, of course, a privileged broad no-solicitation rule), solicitation while entering and leaving the premises, at their homes, and at union meetings. These are time-honored and traditional means by which unions have

conducted their organization campaigns, and experience shows that they are fully adequate to accomplish unionization and accord employees their rights under the Act to freely choose a bargaining agent.

"* * * *The majority in Bonwit Teller did not cite, nor have we been able to find, any support in the statutory language or legislative history for holding that the employer who exercises his own admitted rights under the statute thereby incurs an affirmative obligation to donate his premises and working time to the union for the purpose of propagandizing the employees.*

"* * * We reject the idea that the union has a statutory right to assemble and make campaign speeches to employees on the employer's premises and at the employer's expense. We see no real distinction in principle between this and admitting an employer to the union hall for the purpose of making an anti-union speech, a suggestion which our dissenting colleague would doubtless view with abhorrence. *We believe that the equality of opportunity which the parties have a right to enjoy is that which comes from the lawful use of both the union and the employer of the customary fora and media available to each of them.* It is not to be realistically achieved by attempting, as was done in Bonwit Teller, to make the facilities of the one available to the other." (Emphasis supplied)

The majority below, despite this reversal by the Board itself, upheld the Board's Order in direct contrast to the ruling of the Eighth Circuit in *N.L.R.B.* v. *National Gas Co.*, 215 F. 2d 160. There the Court denied enforcement of a Board Order, where, as here, the Board itself had reversed a rule, and did so during the pendency of the enforcement proceeding. The Court stated

"The Board is asking this Court to enforce an order which it entered upon a state of facts which the Board has later expressly held to be insufficient to justify its taking or exercising jurisdiction under the statute from which its powers are derived.

* * * *

> *"Since our duty is to apply the law in its present form, and not as it existed at the time of the decision and order below* (citing cases), *we must decline to grant the petition for enforcement."* (Emphasis supplied)

The case at bar is in an even stronger position because the rule was changed by the Board itself *prior* to the issuance by the Board of the very order enforced below. As the dissent below held, "The Board was obviously in no position on that date to reaffirm its order of January 15, 1953 setting aside the first election on the basis of the Bonwit Teller Rule, because in the meantime on December 17, 1953 it had denounced that rule" (Appendix, pp. 30, 31).

3. The opinion below is in conflict in principle with the clear holdings of this Court on the expressions of views in labor matters as part of free speech and assembly.

This Court has upheld and protected such expressions as constitutional rights free from the imposition of conditions to their exercise. *Thomas* v. *Collins* 323 U.S. 516, citing *Thornhill* v. *Alabama* 310 U.S. 88, 102; *Senn* v. *Tile Lawyers Protective Union*, 301 U.S. 468, 478. And in *Thomas* v. *Collins* this Court cited *N.L.R.B.* v. *American Tube Bending Co.*, 134 F. 2d 993, and *N.L.R.B.* v. *Ford Motor Co.* 114 F. 2d 905, which upheld the constitutional right of employers to persuade their employees on union affiliation. To the same effect was *N.L.R.B.* v. *Virginia Power Co.*, 314 U.S. 469.

The dissenting opinion, (p. 35) details the successful fight by employers to reach the point that "• • • the Labor Act was not designed to deprive an employer of the right of addressing his employees on the subject of union membership, • • •", and forcibly illustrates the "fundamental" error of the Board in assuming "• • • a power to fix the constitutional limits of the privilege of

free speech" (p. 38) in defiance of the Act and the First Amendment.

Despite the legislative history leading to the enactment of Section 8(c) of the Act and the interpretations of that section as prohibiting the predication of an unfair labor practice on the employer's lawful expression of his views on unionization, the Board continues to accomplish the same result by indirection.

"In the fact of these pronouncements of the courts and of Congress, which would seem to be clear enough, the Board has adopted a new approach to the question. It no longer stigmatizes a non-coercive speech as an unfair labor practice but it asserts the right under certain circumstances to control the utterance of an employer as an exercise of power conferred upon it by the statute to conduct elections. It refrains from holding that an employer's actions immediately before an election constitute unfair labor practices and thus avoids the impact of Section 8(c) of the Act; but it reaches precisely the same end by invoking the provisions of Section 9 of the statute." (Pet. App. p. 36)

Here the Board, mindful of the sanctions imposed on it by Section 8(c) of the Act, has not characterized the conduct of this employer as an unfair labor practice within the meaning of the Act, but has accomplished the same result by condemning such conduct as "discriminatory and prejudiced that atmosphere we believe is essential to a fair exercise of their franchise by the voters" (Pet. App. 21). As the dissent finds, "The will of Congress, as set forth in Section 8(c) of the statute, cannot be evaded by changing the description of the conduct which the Board wishes to restrain. If an employer's speech is coercive to the extent that it prevents 'a fair and untrammelled choice by the employees', it is by the very terms of the Act an unfair labor practice, for that occurs, using the language of Section 8, whenever an employer under-

takes to interfere with or to restrain or to coerce the employees in the exercise of their rights. • • • When we recall the innumerable instances in the past in which the Board has used similar phraseology to stigmatize anti-union utterances of managing officers and supervisors as violative of the act, we can have no doubt that the free speeches in this case amount to an unfair labor practice in the mind of the Board, and would have been so denominated but for the prohibitory words of Section 8(c) of the statute." (Pet. App. pp. 37, 38)

The Board and the majority below cite *N.L.R.B.* v. *A. J. Tower Co.* 329 U.S. 324, and *N.L.R.B.* v. *Waterman Steamship Co.*, 309 U.S. 206, in which cases orders of the Board invalidating elections were upheld on the principle of the *Waterman* case (p. 226) that, "The Control of the election proceedings, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone." The discretion conferred by the Act and approved by those cases involved election detail, and "• • • *none of them involve the area of free speech.*" (Pet. App. p. 38), and are "• • • far from sustaining the view that the Board has the power in its discretion to fix the time and place of non-coercive speeches of management and labor in an election campaign, which do not actually interfere with the conduct of the proceeding itself" (Pet. App. p. 39).

4. Foreman & Clark is not authority for the decision below.

The majority opinion below is based on the authority of *Forman & Clark, Inc.*, v. *NLRB*, 9 Cir. 215 F. 2d 396, cert. den. 348 U.S. 887, which the Court says is "practically on all fours" with this case. To the contrary, *Foreman & Clark*, is so completely distinguishable factually from the instant case as to serve as no valid authority whatever.

In the *Foreman* case the employees were not available to the union for contact since they were isolated. As the

Board found "They [the employees] are separately located and in most instances the salesmen are under direction not to enter their work quarters", at p. 399. In the case at issue all of the employees worked daily in grocery stores open to the public and to representatives of the union. They were regularly visited, solicited and addressed by representatives of the union in their regular places of employment, which were, of course, facilities of the employer.

In addition, in the *Foreman* case the protest of the union was that "management's representatives assembled the employees on the premises of the Company, during the working hours of such employees, and there made statements against the union, without the union having the *opportunity* or the *use of equal facilities* to reply . . ." (at p. 400) In the case at issue, according to all the evidence, the union had numerous opportunities and took advantage of such opportunities to solicit and address the employees of Respondent immediately prior to the election and on the Respondent's facilities.

Furthermore, there is no finding in the *Foreman* case as to when or under what conditions the union had solicited the employees of Foreman. The nine establishments of *Foreman* were in different cities. Its President spoke to the employees in three establishments two days prior to the election and in six establishments one day prior to the election. Without a finding in the *Foreman* case as to what opportunities, if any, were available to the union for solicitation before the President's speeches, the need for an opportunity to reply to the statements made by the President may be understood. In the case at issue, contrary to the *Foreman* case, and as stated above, the union had continually solicited and addressed the employees of the Respondent on numerous days immediately prior to the election and on the facilities of the employer.

Finally, in the *Foreman* case (page 401) the Board had found that: "By *thus* using the Company time and property for electioneering speeches to employee assemblies while in effect denying the union *similar* use, the employer prevented the employees from hearing *both sides* of the story under circumstances which *reasonably approximate equality.*" (Underscoring ours) Respondent, at the risk of being repetitious desires to bring to the Court's attention that, contrary to the *Foreman* case, the union in the case at issue did in fact have *similar* use of the employer's facilities and did solicit and address the employees as the result of which the employees did in fact hear *both sides* of the story under circumstances which more than *reasonably approximated equality* to such an extent that Judge Soper commented (Pet. App. p. 26), "The speeches of the representatives of the Company on the day of the election seem to have been the Company's reply to the union, and the company utilized only this one opportunity to influence the votes of its employees."

In the *Foreman* case before the Board, 101 NLRB 40, the Board Chairman (in a 2 to 1 decision) filed a strong dissent expressing his disapproval of the majority conclusions.

CONCLUSION

The questions involved are of major importance in the administration of the Act involving the impact of the constitutional and statutory right of an employer to express his views on unionization to his employees and the imposition of limitations of time and place thereon by the Board in administering election proceedings.

The Court below has approved the assumption of power by the Board to fix constitutional limits on the privilege of free speech, not authorized by the Constitution nor the Act, the effect whereof is to destroy the privilege and

permit the Board to do indirectly that which the Act prohibits directly.

The majority opinion quotes the decision of the Court in *N.L.R.B.* v. *National Plastic Products Co.*, 175 F. (2) 755, 758, as follows: "Insofar as the certification involves the exercise of discretion, that is a matter with which we are powerless to interfere, *so long as the Board acts within the limits of the law.*" The Board in the exercise of its discretion must, therefore, *act within the limits of the law.* It has no power or right to specify the conditions under which the right of free speech may be exercised. As Judge Soper said "* * * it is seen at once that the decision lies between the privilege of free speech *guaranteed* by the First Amendment and the power of the Labor Board under the Labor Act to regulate the election of bargaining representatives for the employees. Insofar as they may seem to conflict, there is no choice but to uphold the mandate of the Constitution." (Pet. App. 8) (Emphasis supplied)

A decision by this Court will resolve the conflicts between the various Circuit Courts of Appeals, will aid the orderly administration of statutory election proceedings by the Board where a Constitutional right is involved, and will reaffirm that free speech by employers, and others, in labor matters, is free from trespass by the Board.

We respectfully submit that the petition for certiorari should be granted.

JOSEPH F. CASTIELLO
637 Woodward Building
Washington 5, D. C.

NATHANIEL GOLDBERG
MARTIN J. KIRSCH
800 Woodward Building
Washington 5, D. C.
Counsel for Petitioner

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